(17)

Supreme Court, U.S.
FILED
MAY 20 2002
OFFICE OF THE CLERK

No. 01-1368

In the Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, *ET AL.*,

Petitioners,

v.

WILLIAM HIBBS, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent William Hibbs asks leave to proceed *in forma pauperis*. The respondent has not previously sought leave to proceed *in forma pauperis* in any other court.

Respondent's declaration in support of this motion is attached hereto.

Respectfully submitted,

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45 pp

DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, William Hibbs, am the respondent in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month
	You	Spouse	You
Employment	$_____	$_____	$1150.00
Self-employment	$_____	$_____	$_____
Income from real property (such as rental income)	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____
Gifts	$_____	$_____	$_____
Alimony	$_____	$_____	$_____
Child Support	$_____	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____	$_____
Disability (such as social security, insurance payments)	$640.00	$_____	$_____
Unemployment payments	$_____	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____	$_____
Other (specify): _____	$_____	$_____	$_____
Total Monthly Income:	$_____	$_____	$_____

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross Monthly Pay
White Pine Sch. Dist.	Ely, NV	9-91-91 to present	$1,400/month
_____	_____	_____	$_____
_____	_____	_____	$_____
_____	_____	_____	$_____

3 List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross Monthly Pay
_____	_____	_____	$_____
_____	_____	_____	$_____
_____	_____	_____	$_____

4 How much cash do you and your spouse have? $ Nothing in addition to what is listed in response to 01 (no reserve). Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	Type of account	Amount you have	Amount your spouse has
_____	_____	$_____	
_____	_____	$_____	
_____	_____	$_____	

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

[x] Home
Value 21,000.00

[ ] Other real estate
Value _____

[x] Motor Vehicle #1 1966 Ford
Year, make & model Bronco
Value $1200.00

[ ] Other real estate
Year, make & model _____
Value _____

[ ] Other assets
Description _____
Value _____

6.

7. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you

	Amount owed to your spouse	
_____	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

8. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
_____	_____	
_____	_____	
_____	_____	

9. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? [ ] Yes [X] No Is property insurance included? [ ] Yes [X] No	$_____	$_____
Utilities (electricity, heating fuel, water, sewer, and telephone)	$250/mo.	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$500/mo.	$_____
Clothing	$20/mo.	$_____
Laundry and dry-cleaning	$50/mo.	$_____
Medical and dental expenses over	$600/mo.	$_____
Transportation (not including motor vehicle payments)	$_____	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$300/yr.	$_____
Life	$_____	$_____
Health	$_____	$_____
Motor Vehicle	$600/yr.	$_____
Other: _____	$_____	$_____
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$312/yr.	$_____
Installment payments		
Motor Vehicle	$_____	$_____
Credit card(s)	$_____	$_____
Department store(s)	$_____	$_____
Other: _____	$_____	$_____
Alimony, maintenance, and support paid to others	$_____	$_____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$_____	$_____
Other (specify): _____	$_____	$_____
Total monthly expenses:	$_____	$_____

10 Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

[ ] Yes [X] No If yes, describe on an attached sheet.

11. Have you paid - or will you be paying - an attorney any money for services in connection with this case, including the completion of this form? [ ] Yes [X] No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

12. Have you paid - or will you be paying - anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

[ ] Yes [X] No

If yes, how much? _____

13. Provide any other information that will help explain why you cannot pay the costs of this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 4/3, 2002

(Signature)

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT

1. Congress enacted the Family and Medical Leave Act of 1993 ("FMLA" or "Act") "to promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection] clause [of the Fourteenth Amendment]." 29 U.S.C. § 2601(b)(5). Congress found that lack of employment policies to accommodate employees' needs to care for sick family members can force individuals into conflicts between family and job. *Id.* § 2601(a)(2), (a)(3). In particular, Congress found that, "due to the nature of the roles of men and women in our society"—roles that States supported—"the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." *Id.* § 2601(a)(5). The FMLA relieves women of some of the disproportionate burden of family care by accommodating their family medical leave needs and by making family medical leave available to men who had often been denied it based on their sex. The Act seeks "to balance the demands of the workplace with the needs of families ... in a

manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons ... on a gender-neutral basis." *Id.* § 2601(b)(4).

The FMLA entitles eligible employees to take up to 12 work weeks of *unpaid*, job-protected leave per year in certain circumstances that place extraordinary demands on families: the birth, adoption or foster care placement of a child (subsections (A) & (B)); the need to care for a spouse, child or parent with a serious health condition (subsection (C)); or the employee's own serious health condition that renders him or her unable to perform the functions of the job (subsection (D)). *Id.* § 2612(a)(1). Upon return to work at the conclusion of FMLA leave, an employee must be reinstated to his or her former position or its equivalent. *Id.* § 2614(a). The Act enforces those entitlements by making it unlawful to "interfere with, restrain or deny the exercise of" FMLA rights, *id.* § 2615(a)(1), and prohibiting retaliation against any individual for "opposing any practice made unlawful by this subchapter," *id.* § 2615(a)(2); *see also* 29 C.F.R. § 825.220(e) ("Individuals ... are protected from retaliation for opposing ... any practice which they reasonably believe to be a violation of the Act or regulations.").

FMLA remedies include equitable relief such as reinstatement, damages for lost pay and benefits or other actual monetary losses sustained (capped at an amount equal to 12 weeks of wages or salary for the employee), interest, and fees and costs. 29 U.S.C. § 2617(a)(1)(A)(i) & (ii), (a)(1)(B), (a)(3). If an employer cannot demonstrate that its challenged conduct was in good faith and based on a reasonable interpretation of the Act, the employer may also be liable to the employee for liquidated damages in an amount equal to the total actual damages plus interest. *Id.* § 2617(a)(1)(A)(iii). Congress clearly expressed its intent to abrogate States' sovereign

immunity by defining covered "employers" to include "any public agency" as defined in the Fair Labor Standards Act, *id.* § 203(x).

2. This case arose out of a dispute between respondent William Hibbs and petitioners, his state employers, over whether leave other employees donated to Hibbs under Nevada's Catastrophic Leave program ran concurrently (as petitioners contend) or consecutively (as Hibbs contends) with the 12 weeks leave to which the federal FMLA entitled him. Petitioners' position depends, at a minimum, on their having given Hibbs FMLA-mandated prompt, individualized notice when he began his Catastrophic Leave that they intended to count it against his FMLA leave entitlement. The record shows that petitioners failed to give any such notice. It further shows that they fired him in response to his insistence that they were misreading the FMLA, and at a time when his FMLA leave, running consecutively, had not expired.[1]

Hibbs was a Welfare Eligibility Certification Specialist in the Reno District Office of the Nevada Department of Human Resources (DHR) Welfare Division. In 1996, his wife, Dianne, suffered a severe neck injury when the car in which she was a passenger was involved in a collision. D. Exs. J, K, O.[2] Surgery in October 1996 left her with acute and chronic left arm and neck pain. By Spring of 1997, she suffered a range of serious medical complications, including liver damage and addiction as a result of prescribed pain medication, anxiety attacks, clinical depression, and suicidal tendencies, necessitating at one point that she be admitted to a hospital psychiatric unit. She had a metal plate with screws in her neck from which the screws stripped

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[1] In reviewing a case decided on a defendants' motion for summary judgment, this Court applies to the factual record the same standard as would the district court, crediting the plaintiff's version of the facts insofar as a reasonable jury could so find, based on evidence in the record and favorable inferences drawn therefrom. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *see* Fed. R. Civ. P. 56(c), (e).

[2] " D. Ex. __" refers to exhibits accompanying defendants' motion for summary judgment, which is included in their record excerpts on appeal at CR 55.

and loosened to the point of pressing against her esophagus, requiring her to be extremely careful when moving her body so as to avoid a potentially fatal puncture. D. Exs. J, K, CC, DD. Her doctors advised additional surgery and constant personal care, preferably by her husband, before the surgery. The Hibbses scheduled the surgery for November 1997, the recommended specialist's first available date. D. Exs. CC, DD.

In April and May, 1997, Hibbs applied for 12 weeks of unpaid FMLA leave to care for his wife while retaining his job with the Welfare Division. D. Exs. I, J, K. His request was granted on June 23, 1997, for FMLA leave to be taken as needed through December 1997. D. Exs. L, M. The approval notice stated that the leave would "be counted against [his] annual FMLA leave entitlement." *Id.* While his FMLA leave request was pending, Hibbs learned that he might be eligible for paid leave under Nevada's Catastrophic Leave program, and accordingly applied for such leave on June 2, 1991. D. Ex. D. Under the Catastrophic Leave program, employees with accrued, unused annual or sick leave may donate it to other employees to permit them to take paid leave in specified circumstances, including an immediate family member's serious illness or accident. NEV. REV. STAT. 284.362 to 284.3629. Qualifying employees may request up to a maximum of 26 weeks, or 6 months, of catastrophic leave in a calendar year. NEV. REV. STAT. 284.3622. Hibbs preferred to use Nevada Catastrophic Leave first, and save his unpaid federal FMLA leave for when paid leave donations were no longer available. P. Ex. 1 (Hibbs Aff. ¶ 9).[3] Hibbs received leave pledges from other employees and obtained approvals for approximately nine and a half weeks of catastrophic leave. D. Exs. O, T.[4]

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[3] "P. Ex. __" refers to exhibits to plaintiff's motion for partial summary judgment, which appear at Tab D in plaintiff-appellant's exercpts of record on appeal.

[4] His request for paid catastrophic leave was initially approved on August 11, 1997, for up to 5 weeks of paid leave, D. Ex. O, and an additional 4 ½ weeks of paid catastrophic leave was approved on September 17, 1997, D. Ex. T. Although the second request was approved for 4 ½ weeks of leave (180 hours), only 144 hours of leave had been donated specifically for his use, leaving him 36 hours short. D. Ex. W. The DHR Director's Office approved the additional 36 hours out of the Department's Catastrophic Leave account on October 15, 1997. D. Ex. Z.

Hibbs had started taking unpaid FMLA leave intermittently after June 23, when his FMLA leave request was approved, and he started taking such leave full time after August 5. *See* Pet. App. 2a. When his first paid Catastrophic Leave grant took effect on August 11, *see* D. Exs. P, N, he had already used approximately 3 weeks of FMLA leave, with approximately 9 weeks of unpaid FMLA leave remaining. The Catastrophic Leave donations allowed Hibbs to be on full-time paid leave from August 11 until mid-October, when he expected to be able to rely on his remaining unpaid FMLA leave to carry him through his wife's late-November surgery and initial recuperation.

The FMLA permits employers to require their employees to "substitute any of the accrued paid vacation leave, personal leave, ... family leave [or medical or sick leave] of the employee for leave provided under subparagraph ... (C)." 29 U.S.C. § 2612(d)(2)(A). The employer may only count those forms of paid leave as FMLA leave, however, if the employer gives the employee advance notice of its intent to do so "within one or two business days [after notice of the need for leave is given] if feasible." 29 C.F.R. §§ 825.208(a), 825.301(c). *See generally Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (2002). Hibbs had no advance notice, however, that his employers would seek to count his use of donated Catastrophic Leave against his entitlement to 12 weeks of unpaid FMLA leave.[5]

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[5] The court of appeals erroneously stated that Hibbs "was informed that the [catastrophic leave] would 'be counted against [his] annual FMLA leave entitlement,'" Pet. App. 2a, when in fact the phrase the court quotes appears only on the form approving Hibbs' first request, for 12 weeks of *unpaid FMLA leave*, and specifies that *that* leave would be counted against his annual FMLA leave entitlement. D. Ex. R. Petitioners nonetheless suggest that that form gave Hibbs adequate notice that the Catastrophic Leave would run concurrently with his FMLA leave. In support of their claim that they gave notice, they also point to (1) two boilerplate reminders regarding filling out Biweekly Time and Attendance sheets (BTAs) to "Be sure to use the

An October 10, 1997, letter from petitioners informed respondent that his "FMLA leave of 12 weeks has been fulfilled," and that all donated catastrophic leave hours would be exhausted by October 13. D. Ex. X.[6] The letter concluded: "Welfare personnel is requiring an updated physician notice explaining your wife's diagnosis, prognosis and need for your presence no later than October 15, 1997. At that time you will need to decide whether your intent is to return back to work or reapply for additional catastrophic leave." *Id.* Hibbs provided an updated doctors' certification and on October 15 requested 200 more hours of paid catastrophic leave, D. Ex. AA, seeking full-time paid leave until late November. On October 21, the Welfare Division approved it and sent it to the Office of the Director of the Nevada Department of Human Resources for final signature. *Id.* The remaining unpaid leave, if used consecutively with that additional Catastrophic Leave, would have covered Hibbs until late January, 1998.

Believing that he had additional paid Catastrophic Leave and should still be able to use the balance of his unpaid FMLA leave when the Catastrophic Leave expired, Hibbs initiated a meeting on November 3, 1997, with petitioner Firpo and his immediate supervisor, Sue Schultz. Hibbs updated them on his wife's health problems, including his plans to take her to the

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appropriate codes when recording your FMLA CATASTROPHIC leave, ANNUAL (FMAL), SICK (FMS), FAMILY SICK (FMFS), CATASTROPHIC (FMCL), LWOP (FMLP))," Exs. Q, U; and (2) a memo stating "[i]f you do not want to use 40 hours per week of Catastrophic Leave, your BTA should reflect FMLP for the hours not covered by the Catastrophic Leave," Ex. P; *see* Def.'s Mot. Summ. J. at 4; D. App. Br. at 8. Those documents did not notify Hibbs that petitioners would count his Catastrophic Leave against his FMLA leave entitlement. (Moreover, when an employee is on leave from work, his employer ordinarily is the person who fills out and submits the BTAs, and that practice was followed with respect to Hibbs when he was on leave. P. Ex. 2 at 93 (Perwein Dep. 43). Hibbs filled out no BTAs after July 25, 1997.) In any event, the court of appeals did not specify when notice was given, and the issue of whether or when any notice was given remains unresolved in this preliminary posture.

[6] Once the missing 36 hours of the 180 hours approved on September 17 was obtained from the leave bank, Hibbs apparently had an additional 4 1/2 days of approved, paid leave, *i.e.* until October 20. *See supra* n. 4.

specialist in Arizona for surgery within the coming weeks. D. Ex. CC.[7] He also stated his hope to be available to return to work by January 5, 1998, D. Ex. CC, DD, and he explained that his only expectation was to be able to take his unpaid leave and return to his job. That expectation was based on Hibbs' belief that if he started his remaining unpaid leave when his paid leave ran out, that would provide the remaining time he needed. *See* D. Exs. CC, DD; P. Ex. 1 (Hibbs Aff. ¶¶ 9, 12). Petitioner Firpo told him she would review the available information and options, and assured him that he would be given "ample notice of any decision taken by Nevada State Welfare." D. Ex. CC.

The situation abruptly changed following the November 3 meeting. On November 5, petitioners retracted their support of the Catastrophic Leave upon which Hibbs was then relying, recalling the papers from the Director's Office where they were awaiting final approval. *See* D. Ex. AA (handwritten notation). On November 6, petitioner Firpo personally delivered to Hibbs' home a letter stating that "[n]o additional catastrophic leave or leave without pay will be granted," asserting that "[i]t is time for you to make other arrangements for your wife's care," and requiring him to report to work on November 12 or face disciplinary action. D. Ex. EE. On November 7 at 7:50 a.m., Hibbs called petitioner Firpo to say that his wife's surgery was imminent, and that he doubted he could return to work on November 12. D. Ex. FF. Firpo insisted that no more time off would be authorized. *Id.* When Firpo delivered a written reprimand to Hibbs on November 13, Hibbs reiterated his understanding that he still had unpaid FMLA leave and asked what had happened to that leave. P. Ex. 1 (Hibbs Aff. ¶ 11); D. Exs. GG, HH. Firpo said that she could not answer leave questions. P. Ex. 1 (Hibbs Aff. ¶ 11). Hibbs

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[7] Hibbs' affidavit identifies the date of the meeting as November 6, whereas Firpo's and Schultz's file memos date it as November 3. *See* P. Ex. 1 (Hibbs Aff. ¶¶ 8, 12); D. Ex. CC, DD. For current purposes, we assume that the meeting took place on November 3.

responded that his wife's condition had not improved, and that he wished to use his unpaid FMLA leave. *Id.* (¶ 12).

On December 5, petitioner Firpo recommended Hibbs' dismissal for having been "absent without leave" since November 12, D. Ex. II, and the dismissal became effective on December 22, 1997, Pet. App. 3a. After a postponement while her husband prepared for and participated in a hearing relating to his dismissal, *see* Pet. App. 3a, Dianne Hibbs underwent surgery in Arizona around the end of 1997.

3. On April 20, 1998, Hibbs filed suit in federal district court against the Nevada Department of Human Resources, its director, Charlotte Crawford,[8] and the Director of the DHR Welfare Division, Nikki Firpo. Hibbs claimed that petitioners violated the FMLA by retaliating against him when he opposed their efforts retroactively to count his catastrophic leave against his FMLA leave, and for firing him when he was on approved, unexpired FMLA leave.[9] Hibbs sought back pay, damages, declaratory and injunctive relief including reinstatement, interest, fees and costs, and all other appropriate relief. On petitioners' motion for summary judgment, the district court ruled from the bench that Hibbs' FMLA claim was barred by the State's sovereign immunity. Pet. App. 47a-58a.

4. The United States intervened on appeal to defend the constitutionality of retrospective relief in private actions against state employers who violate 29 U.S.C. § 2612(a)(1)(C), and the court of appeals reversed the grant of summary judgment for petitioners on the FMLA claim. In a unanimous opinion, the court held that Congress, in authorizing family medical leave, had clearly expressed its intent to abrogate the States' Eleventh Amendment immunity, Pet. App. 8a-

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[8] By the time Hibbs filed his Complaint, Crawford had replaced the previous Director, Myla Florence.

[9] He also asserted federal due process and state law claims that are not at issue here.

9a, and that it had the authority to do so under section 5 of the Fourteenth Amendment in order to remedy and prevent unconstitutional sex discrimination, Pet. App. 12a-42a. The court first underscored that, in contrast to its deferential approach to age or disability discrimination, this Court's heightened standard of equal protection review of sex-based discrimination should correspond to a decreased burden on Congress to demonstrate its grounds for identifying an equal protection problem warranting remediation and deterrence pursuant to its section 5 authority. Pet. App. 17a-19a. The court went on to find that the legislative history showed "widespread intentional gender discrimination by states," whose "discriminatory leave policies are just the sort of difficult and intractable problem that justifies broad prophylactic measures in response." Pet. App. 21a. Alternatively, the court found ample support for the FMLA's remedial character in the fact that it was "designed to undo the impact of [a] history of state-supported and mandated sex discrimination as it continues to affect public and private employment." Pet. App. 23a.

The court of appeals concluded that the FMLA is a congruent and proportional response to States' unconstitutional sex discrimination because the Act "focuses on only one type of policy," family leave, the guarantee of which Congress concluded would be a "a modest step" toward counteracting sex discrimination by state and non-state employers alike. Pet. App. 40a. The court reasoned that a sex-neutral remedy, rather than one targeted only at women, is congruent and proportional because the discrimination affects both sexes. A sex-neutral solution both avoids unconstitutionally benefiting women alone based on over-broad generalizations that men do not also need family medical leave, and blunts incentives to discriminate against women born of expectations that they will take more leave than men. *Id.* at 36a-40a. Further, the court

concluded that "the statute protects job security, not wage continuation," and thus "is *not* principally concerned with providing an economic benefit." *Id.* at 40a.

The court of appeals accordingly reversed and remanded the case for further proceedings. The remand order included respondent's FMLA claim against the State, as well as his FMLA claims against the individual defendants seeking reinstatement under *Ex Parte Young*. Pet. App. 43a-44a & n.32, 46a. Petitioners did not seek panel or *en banc* rehearing. The panel granted petitioners' motion to stay the court of appeals' mandate, over respondent's opposition.

REASONS FOR DENYING THE PETITION

The petition should be denied as unripe. Petitioners seek interlocutory review of a constitutional question that might be avoided if the case were permitted to proceed to final judgment. The question petitioners present would be moot if Hibbs were to recover on his retaliation theory because the validity of 29 U.S.C. § 2615(a)(2), barring retaliation against employees for opposing practices the FMLA makes unlawful, is appropriate section 5 legislation enforcing the First Amendment without regard to whether the grant of family medical leave in section 2612(a)(1)(C) is appropriate as remedial and prophylactic equal protection legislation. The question presented could equally prove moot on other grounds suggested but not fully developed in the record.

The only reason petitioners offer for granting immediate review in the face of those contingencies is the need for clarity about whether the States must comply with the FMLA, but whether private actions for damages are available to enforce section 2612(a)(1)(C) will not alter the indisputable legal obligation of Nevada and every other State in the Ninth Circuit to comply with that provision. Immediate review also would have little or no effect on the State of Nevada's litigation burdens, because Hibbs' *Ex Parte Young* claim against the individual

government officials for reinstatement necessitates litigation of the merits of his claim of violation of section 2612(a)(1)(C) in any event, and his retaliation claim entitles him to seek the full amount of his damages directly against the State. In contrast to the negligible burdens denial of review would impose on the State, Hibbs would suffer from the delay of litigating in this Court while the lower court's mandate is stayed. He has already pressed this case for more than four years in the lower courts while awaiting reinstatement to his job, yet his entitlement even to non-damages relief has been stayed pending resolution of the petition.

Given the benefits of further litigation in the lower courts and the absence of need for immediate review, the negligible conflict between the decision below and a lone contrary appellate case does not warrant this Court's exercise of its discretionary certiorari jurisdiction—especially given that the decision below correctly upholds a provision of federal law entitled to a strong presumption of constitutionality. This Court should deny the petition and permit the case to be litigated to final judgment, at which time both the necessity, if any, of deciding the constitutional question and the context for doing so will be clear.

I. CERTIORARI SHOULD BE DENIED IN LIGHT OF STRONG REASONS TO AVOID PREMATURE DECISION OF A CONSTITUTIONAL QUESTION THAT MAY BE AVOIDABLE, AND THE LACK OF NEED FOR INTERLOCUTORY REVIEW BY THIS COURT.

The petition is unripe because petitioners seek this Court's review of a non-final order remanding the case. *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (citing *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 257-58 (1916)).[10] The principle that sovereign immunity claims ordinarily are resolved at

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[10] *See American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893) (Supreme Court ordinarily should not review interlocutory decision "unless [immediate review] is necessary to prevent extraordinary inconvenience and embarrassment to the conduct of the cause."); Robert L. Stern et al., *Supreme Court Practice* § 2.2, at 40 (7th ed. 1993)

the outset of litigation, *see Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), does not support a discretionary grant of certiorari to review the interlocutory order in this case. Instead, because further proceedings would allow potentially informative record clarification[11] and may render petitioners' constitutional question moot, the doctrine of constitutional avoidance strongly supports denying the petition.[12] There are any number of ways in which the question presented in the petition could become moot.[13] In

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(discussing ordinary practice of "declin[ing] to exercise its discretionary jurisdiction to review judgments that are not final").

[11] For example, one equal protection basis Congress identified supporting enactment of the FMLA was the discrimination that occurred when leave decisions were made on a case-by-case basis at employers' sole discretion. *See infra* Point III. Explication in this case of facts relevant to that problem could provide the Court with a more concrete appreciation of relevant dynamics. Potentially relevant facts might be the circumstances of employees similarly situated to Hibbs whom petitioners permitted to use different types of leave consecutively while Hibbs was denied the ability to do so.

[12] This Court should not "anticipate a question of constitutional law in advance of the necessity of deciding it." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J. concurring); *see id.* at 347 ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."); *Lyng v. Nothwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of necessity of deciding them."); *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

[13] This Court's recent decision in *Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (2002), which altered the remedial inquiry for claims (like Hibbs') of lack of notice that another form of leave is being counted against the FMLA leave entitlement, could conceivably eliminate Hibbs' claim for retrospective relief. The damages claim appears likely to survive *Ragsdale*. First, it is not at all clear, even if notice had been given, that the FMLA would permit substitution of Catastrophic Leave donated by other employees. The statute only authorizes substitution of "any of the accrued paid vacation leave, personal leave, family leave [or medical or sick leave] of the employee," 29 U.S.C. § 2612(d)(2)(A), and Catastrophic Leave donated by other employees does not clearly qualify as "accrued ... family [or medical] leave ... of the employee." Second, although the record on the point is undeveloped, Hibbs seems likely to be able to satisfy the *Ragsdale* requirement of proof of actual harm caused by petitioners' failure to give the required notice, such as by showing "that []he would have taken less leave or

particular, if Hibbs were to receive full monetary relief under his First Amendment retaliation theory, that would moot the need to decide the question presented here.

A. Congress's Clear Authority To Ban Retaliation for First Amendment-Protected Employee Speech Fully Supports the Judgment Below and Makes Immediate Decision of Petitioners' Broader Section 5 Question Inappropriate.

Even if section 2612(a)(1)(C) of the FMLA is supported only by the Commerce Clause and not by section 5 of the Fourteenth Amendment, the State is properly subject to suit for all of the retrospective relief Hibbs seeks. No meaningful protection of the State's dignitary interest would be attained by granting the petition. *Cf. Puerto Rico Aqueduct*, 506 U.S. at 146. That is because, whether or not section 2612(a)(1)(C) of the FMLA has section 5 support, Congress has section 5 power to enforce public employee speech rights against retaliatory discharge through a separate provision of the FMLA, section 2615(a)(2). Under the FMLA, it is unlawful for any employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise" FMLA rights such as by firing an employee because he is on subsection (C) FMLA family medical leave, 29 U.S.C. § 2615(a)(1), and it is unlawful to "discharge or in any manner discriminate against any individual for opposing any practice made unlawful" by the FMLA such as by firing an employee for opposing the employer's erroneous interpretation of the FMLA, *id.* § 2615(a)(2); 29 C.F.R. § 825.220(e). Here, in addition to contending that petitioners interfered with his exercise of FMLA rights by firing him when he was on leave, in violation of section 2615(a)(1), Hibbs also claims that they retaliated against him when, starting at the November 3

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intermittent leave if [he] had received the required notice." *See Ragsdale*, 122 S. Ct. at 1161-63. The Court should deny review at this stage to allow such contingencies to be resolved. The constitutional question petitioners present "ought not be decided except in an actual factual setting that makes such a decision necessary." *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 294-95 (1981)).

meeting, he voiced his opposition to petitioners' unlawful reading of the FMLA. That alleged retaliation, if true, constituted a violation of section 2615(a)(2). And this retaliation-for-opposition provision of the FMLA has targeted section 5 support based on the First Amendment that is distinct from the overlapping but broader equal protection ground on which the court below relied.[14]

The FMLA's authorization of retrospective relief against state employers who engage in such retaliation is at the core of Congress's power under section 5 to enforce the First Amendment's Free Speech Clause through the Due Process Clause of the Fourteenth Amendment. FMLA retaliation claims generally, and Hibbs' in particular, are based on conduct that is protected by the First Amendment Freedom of Speech Clause as this Court has interpreted it. This Court's cases prohibit retaliation against public employees for nondisruptive speech on matters of public concern. *Pickering v. Board of Educ.*, 391 U.S. 563, 573-574 (1968); *Connick v. Myers*, 461 U.S. 138, 155 (1983). Even employee speech that is motivated by a desire to defeat adverse employment action may still address matters of public concern. *See Connick*, 461 U.S. at 141, 150 (concluding that some of the matters that employee raised in an effort to avoid being transferred were issues of public concern); *Rankin v. McPherson*, 483 U.S. 386, 397-398 (1987) (Scalia, J., dissenting) (emphasizing distinction between motive for and content of employees' remark). First Amendment protection "is not lost to the public employee who

[14] There is a genuine factual issue as to whether petitioners fired Hibbs in retaliation for his opposition to their interpretation of the FMLA. It was at the November 3 meeting that Hibbs first asserted to his supervisors, Sue Schultz and petitioner Nikki Firpo, that the FMLA, as he understood it, required FMLA leave to run consecutively and not concurrently with other forms of leave. *See* D. Ex. CC, DD; P. Ex. 1 (Hibbs Aff. ¶¶ 9, 12). The sequence of adverse actions against Hibbs immediately following the November 3 meeting, culminating in Hibbs' discharge, raises an inference of retaliatory motive on petitioners' part that a factfinder would be permitted to credit. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (close temporal proximity between employer's awareness of protected activity and adverse employment action can give rise to an inference of retaliatory motive).

arranges to communicate privately with his employer rather than to spread his views before the public." *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979); *see Rankin*, 483 U.S. at 387 n.11 ("The private nature of the statement does not ... vitiate the status of the statement as addressing a matter of public concern."); *Connick*, 461 U.S. at 152-54.[15] Here, just as in *Givhan*, what is at stake is an employee assertion, made privately to a supervisor in the context of a disputed personnel action, that an employer was violating important federal rights. Hibbs' statements, and employees' stated opposition to unlawful employer practices generally, are matters of public concern under this Court's precedents.

The FMLA's anti-retaliation protection is purely remedial, analogous to the legislation prohibiting race-based juror qualification that this Court sustained in *Ex Parte Virginia*, 100 U.S. (10 Otto) 339 (1879), and not to the broader, prophylactic legislation at issue in *Garrett*, *Kimel*, *Florida Prepaid* and *Boerne*, and is thus *per se* congruent and proportional. It is only when a statute prohibits "a broader swath of conduct" than is barred by this Court's constitutional cases that a detailed congruence and proportionality analysis is needed to discern whether the statute is appropriate Fourteenth Amendment legislation.[16] In order to sustain the FMLA's anti-retaliation

[15] Opposition to practices that the FMLA makes unlawful is more than mere "complaint about a change in the employee's own duties," *United States v. National Treasury Employees Union*, 513 U.S. 454, 466 (1995), or garden-variety "criticism directed at a public official," *Connick*, 461 U.S. at 149. Congress is well within its section 5 power in treating criticism of the states' administration of federal civil rights laws as a matter of public concern for First Amendment purposes.

[16] *Cf. Board of Trustees of University of Alabama at Birmingham v. Garrett*, 531 U.S. 356, 365 (2001) (section 5 legislation "reaching beyond the scope of § 1's actual guarantees must exhibit" congruence and proportionality."); *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) ("preventive rules" are appropriate remedial measures only where there is "a congruence between the means used and the ends to be achieved").

remedy, there is no need to approve a protective buffer zone around state employees' First Amendment rights, so no special showing of any pattern of violations need be made.

Although the court of appeals, in sustaining section 2612(a)(1)(C), did not analyze the distinct question of Congress's section 5 authority to enforce public employees' constitutional right to free speech by providing remedies against unlawful retaliation, its decision was valid on that alternative section 5 ground. Hibbs has consistently pressed his retaliation theory, and there is no question of waiver.[17] The First Amendment retaliation theory of Congress's section 5 power is not, however, itself ripe for review on certiorari in the absence of any circuit conflict.[18] That alternative rationale justifying Hibbs' damages claim instead underscores both the lack of any pressing need to decide petitioners' question at this time, and the awkwardness of this case as a vehicle for review of that question. Were this Court to grant review, it would be faced with

[17] As the prevailing party, Hibbs is "of course free to defend [his] judgment on any ground properly raised below whether or not that ground was relied upon, rejected or even considered by the district court or the court of appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). Respondent has properly raised this claim. He has alleged retaliation as a basis for his FMLA claim in his complaint, *see* Complaint ¶ 34, and he has consistently pursued his retaliation theory in the trial court, *see, e.g.*, Pl.'s Mot. for Partial Summ. J. at 16, and on appeal, *see, e.g.*, Plaintiff-Appellant's Br. (10/14/99) at 8, 19, 22, 24. The distinct argument that the FMLA retaliation provision is valid under section 5 as enforcement of First Amendment speech rights is "not a new claim within the meaning of that rule, but a new argument to support what has been [respondent's] consistent claim," and is thus not subject to waiver. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

[18] The only lower courts to have considered this argument have at least provisionally credited it. *See Roberts v. Pennsylvania Dep't of Public Welfare*, No. Civ.A.99-3836, 2002 WL 253945 (E.D. Pa. Feb. 20, 2002) (holding that provision of Americans with Disabilities Act that forbids an employer from taking adverse action against an employee for "opposing any act or practice made unlawful" by the ADA is valid §5 legislation to enforce First Amendment); *cf. Rhode Island Dep't of Envtl. Mgmt. v. United States*, 286 F.3d 27, 42 (1st Cir. 2002) (viewing as "colorable" an argument that an environmental statute's whistleblower protection was "enacted to safeguard First Amendment rights that have long been made applicable to states through the Fourteenth Amendment," and dismissing claim on other grounds).

the unattractive choice of either considering the alternative theory before the courts of appeals have had an opportunity to do so, or rendering a decision limited to petitioners' question presented that may well become moot if Hibbs ultimately prevails on the alternative retaliation ground. For all these reasons, the petition should be denied.

B. Denying the Petition Will Not Affect the State's Legal Obligation To Comply with the FMLA or Burden the State with Unnecessary Litigation.

The only reason petitioners offer in support of immediate review at this interlocutory stage of the litigation is that the decision creates legal "uncertainty" that is a "hindrance" to the "hiring and firing practices" of States in the Ninth Circuit. Pet. 15. But, contrary to petitioners' assertions, *id.*, the decision below has no effect on whether state officials are "free to fire" employees for exercising their FMLA rights. Petitioners' section 5 challenge affects only the availability of judicially ordered retrospective relief against States, not the legal standards governing States' primary conduct. Even were petitioners to prevail on their sovereign immunity defense, they would not be relieved of their legal obligation under the Supremacy Clause to comply with the FMLA, which is indisputably valid as Commerce Clause legislation applicable to government and private employers alike. *See* U.S. Const. art. VI, cl. 2; *Alden v. Maine*, 527 U.S. 706, 732 (1999) ("When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States."); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The FMLA is enforceable not only through private actions, but also in administrative or civil actions by the Secretary of Labor, 29 U.S.C. § 2617(a), (b), in which the availability of monetary relief is unaffected by the scope of Congress's section 5 power.

The availability of retrospective relief also, as a practical matter, has virtually no impact on the litigation burdens the petitioners must face in federal court. Respondent has live claims

for prospective injunctive relief under *Ex Parte Young* against supervisory employees, petitioners Nikki Firpo and Charlotte Crawford, which the court of appeals included in its remand and petitioners do not challenge here. Pet. App. 42a-44a & n. 32.[19] Petitioners' sovereign immunity defense has no bearing on Hibbs' claims for prospective relief, including reinstatement, fees and costs against state officials. *See Ex Parte Young*, 209 U.S. 123 (1908); *Hutto v. Finney*, 437 U.S. 678, 695 (1978). Litigation of the *Ex Parte Young* claims involves the same witnesses, the same evidence, and the same trial on the merits as litigation of the damages claim. Indeed, under respondent's First Amendment retaliation theory, the amount of monetary relief would also have to be determined, even if 29 U.S.C. § 2612(a)(1)(C) did not validly abrogate the State's sovereign immunity. *See supra* Point I.A.

II. PETITIONERS VASTLY OVERSTATE THE EXTENT OF THE CONFLICT AMONG THE CIRCUITS, WHICH DOES NOT WARRANT IMMEDIATE RESOLUTION BY THIS COURT.

The circuit conflict is minimal and, especially in view of the strong reasons to avoid interlocutory review in this case, *see supra* Point I, the issue should be left to percolate further in the courts of appeals before this Court reviews it. The petition is limited to the question whether a damages remedy for States' violations of 29 U.S.C. § 2612(a)(1)(C) is appropriate legislation under section 5 of the Fourteenth Amendment, and petitioners assert that the court of appeals decision sustaining that remedy conflicts with decisions of eight other circuits and one state high court. *See* Pet. 8. As the court of appeals pointed out and petitioners acknowledge, however, virtually all of the courts that have held that section 5 fails to support FMLA retrospective relief

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[19] The court below apparently erred in believing that the availability of relief under *Ex Parte Young* depends on whether the defendant officials are "employers" under the FMLA, Pet. App. 44a n.32, because "the inquiry into whether suit lies under *Ex Parte Young* does not include an analysis of the merits of the claim." *Verizon Maryland Inc. v. Public Util. Comm'n of Maryland*, 535 U.S. __, slip op. at 10 (May 20, 2002).

against state employers have done so in the context of claims under a different statutory provision from the one at issue here, *i.e.*, section 2612(a)(1)(D) regarding personal medical leave as opposed to section 2612(a)(1)(C) regarding family medical leave.[20] "The difference matters," the court of appeals explained, because the family medical leave provisions are more clearly "an attempt to remedy gender discrimination." Pet. App. 6a; *see also Laro v. New Hampshire*, 259 F.3d 1, 9 (1st Cir. 2001) (expressly limiting holding to section 2612(a)(1)(D), because "[th]e constitutional arguments in support of the remaining provisions have greater strength and raise issues (for instance, their implications for family roles) not at issue here"); *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000) (expressly limiting holding to the personal medical leave provision); *Garrett*, 193 F.3d at 1219 (opinion limited to "the provision at issue here," *i.e.* section 2612(a)(1)(D)); *see generally Garrett*, 531 U.S. at 360 n.1 (finding no section 5 support for ADA Title I, but declining to address adequacy of such support for ADA Title II). Indeed, some of the decisions invalidating retrospective relief under subsection (D) expressly contrast its invalidity with the apparent validity of subsection (C) and thus accord rather than conflict with the court of appeals' decision at issue here.[21] The Department of Justice makes the same distinction, having

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[20] *See Laro v. New Hampshire*, 259 F.3d 1, 11 (1st Cir. 2001); *Lizzi v. Alexander*, 255 F.3d 128, 131, 135 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 812 (2002); *Townsel v. Missouri*, 233 F.3d 1094, 1096 (8th Cir. 2000); *Chittister v. Department of Cmty. & Econ. Dev.*, 226 F.3d 223, 229 (3d Cir. 2000); *Sims v. Univ. of Cincinnati*, 219 F.3d 559, 566 (6th Cir. 2000); *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000); *Garrett v. University of Ala. at Birmingham Bd. of Trustees*, 193 F.3d 1214, 1220 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001); *Schall v. Wichita State Univ.*, 7 P.3d 1144, 1162 (Kan. 2000); *but see Thomson v. Ohio State Univ. Hosp.*, 238 F.3d 424, 2000 WL 1721038 (6th Cir. 2000) (unpublished disposition); *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000).

[21] *See Laro*, 259 F.3d at 12 (identifying sex discrimination that "provides a rationale for the parental and family-care leave provisions," and observing that a legislative record deficient with respect to personal medical leave does document discrimination "with respect to parental leave ... and perhaps leave to care for family members"); *see also Garrett* 193 F.3d at 1220 (personal medical leave provision, in contrast to the other FMLA provisions, derives no support from suggestions that the FMLA is designed to "protect women from discrimination due to issues

declined to defend the constitutionality of subsection (D) damages against state employers, while actively defending the same remedy here and in other subsection (C) cases.[22]

Only two courts of appeals (in addition to the Ninth Circuit in this case) have considered whether employees may recover retrospective relief against States pursuant to 29 U.S.C. § 2612(a)(1)(C). *See Thomson*, 238 F.3d 424; *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000). *Thomson*, however, was an unpublished, *per curiam* opinion. Under the Sixth Circuit's own rules, "citation of unpublished decisions in briefs and oral arguments" is disfavored, "except for the purpose of establishing res judicata, estoppel, or law of the case." Local Rule 28(g). Sixth Circuit unpublished opinions therefore have little, if any, precedential value. *See id.*; *see also United States v. Smithers*, 212 F.3d 303, 323 (6th Cir. 2000); *Hall v. Shipley*, 932 F.2d 1147, 1151 (6th Cir. 1991). *Thomson* thus does not create a circuit conflict calling for this Court's resolution.

Thus, as the court below recognized, only the divided panel decision in *Kazmier* is at odds with the decision in this case. The *Kazmier* panel concluded, over a strong dissent by Judge Dennis, that FMLA subections (C) and (D) do not validly abrogate state sovereign immunity.[23]

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regarding pregnancy, child care, and care taking of family members"). The thoughtful dissenting opinions in those cases further explain the validity of subsection (C). *See Laro*, 259 F.3d at 17 (Lipez, J., dissenting); *Garrett*, 193 F.3d at 1220 (Cook, J., dissenting).

[22] *See* Letters from Theodore B. Olson to J. Dennis Hastert, Speaker of the House of Representatives, and Richard B. Cheney, President of the Senate *re: Bates v. Indiana Dep't of Corrections, No. IPO1-1159-C-H/G (S.D. Ind.)* (Dec. 20, 2001) (communicating Solicitor General's decision not to defend 29 U.S.C. 2612(a)(1)(D) as appropriate section 5 legislation but reserving judgment as to other subsections) (letters lodged with the Court); Brief for the United States as Intervenor-Appellant in *Bylsma v. Davis*, No. 01-16102-A (11th Cir. filed April 9, 2002) (defending 29 U.S.C. 2612(a)(1)(C) as appropriate section 5 legislation).

[23] The fact that the Fifth Circuit in *Kazmier* engaged in a distinct subsection (C) analysis, rather than simply relying on its subsection (D) analysis as dispositive with respect to both provisions, supports the conclusion of the court below (Pet. App. 5a-6a) that the cases dealing only with subsection (D) raise distinct section 5 issues and thus do not conflict with the decision

Even where the lower courts are in clear conflict, this Court often defers consideration of novel questions of law to permit further development. The conflict between the decision below and a single, divided decision from another circuit is not a sufficient reason to warrant this Court's review here.[24] The inappropriateness of review at this time is highlighted by the lack of a final order, indicating that the issue petitioners raise may not be dispositive and that the record remains unsettled. *See supra* Point I. The prudent course is thus to deny the petition at this time.

III. THE DECISION BELOW IS CORRECT.

Section 2612(a)(1)(C) of the FMLA is a nuanced and limited measure seeking to remedy and deter States' unconstitutional sex discrimination, and is thus a valid exercise of Congress's power under § 5 of the Fourteenth Amendment. Petitioners' request for summary reversal is utterly inappropriate, and both it and the request for plenary review should be denied.

Section 2612(a)(1)(C) addresses a familiar and lamentable sex discrimination problem in the job market today: *States frequently act on the assumption that a woman is more likely than a man to need time away from work to care for her family.* This assumption is almost always unspoken, is usually not intended to signal any disrespect for either sex, and is exceedingly difficult to prove. Moreover, as the court of appeals explained, it has long roots in past, overt, sex-based state policies that "treat[ed] women as non-essential workers, with principal

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below regarding subsection (C). *See Kazmier*, 225 F.3d at 525 ("[W]e discern no reason why the provisions of one of the FMLA's subsections could not validly abrogate the States' Eleventh Amendment immunity even if the provisions of some or all of the remaining subsections fail to do so.")

[24] It remains unclear whether even this minimal conflict may resolve itself without this Court's intervention. Given that the Fifth Circuit has yet to speak *en banc* on the issue, the law could ultimately crystalize in a subsequent case in that court in conformity with the views of Judge Dennis in *Kazmier* and the Ninth Circuit in this case. *Cf., e.g., United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (en banc) (reversing panel decision and thereby eliminating circuit conflict regarding whether the United States is covered by reference to "whoever" in 18 U.S.C. § 201(c)(2)).

responsibility for the family." Pet. App. 23a. As a generalization about current average tendencies of women and men, it may be a factually accurate one. But state decisions based on the assumption that, because of sex, a woman is more likely than a man to want and/or need to be away from work to take care of her family plainly violate equal protection as this Court has interpreted it.

This Court's cases skeptically scrutinize and presumptively reject any state decision based on sex, including those based on overbroad notions about the capacities and preferences of men and women. *See generally United States v. Virginia*, 518 U.S. 515, 533 (1996). This Court has repeatedly recognized the pervasive part that sex-role stereotypes have played in maintaining inequality between men and women, and has been vigilant in striking down States' actions that are predicated on notions that a woman's place is in the home. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980); *Orr v. Orr*, 440 U.S. 268 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972). When States treat female and male employees differently due to sex-based assumptions that they will have differential responsibilities in staying home to care for sick family members, they violate the Equal Protection Clause as this Court has interpreted it. Such sex-based generalizations are constitutionally forbidden even when they intend no disrespect of women, *see Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982); *Orr*, 440 U.S. at 283, and even where as a general matter they may be factually supported, *see Virginia*, 518 U.S. at 542; *J.E.B. v. Alabama*, 511 U.S. 127, 139 n.11 (1994); *id.* at 149 (O'Connor, J., concurring), *Craig v. Boren*, 429 U.S. 190, 201 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975).

One equal protection problem to which section 2612(a)(1)(C) responded was the continuing incidence of overt sex discrimination in state leave policies. As the court of appeals observed, "the legislative history of the FMLA contains substantial evidence of gender

discrimination with respect to the granting of leave to state employees, and ... it therefore justifies the enactment of the FMLA as a prophylactic measure." Pet. App. 20a. The court pointed to studies in the legislative history

> show[ing] significant gender-based disparities in the coverage of state leave *policies*. They thus indicate widespread intentional gender discrimination by states. Moreover, the studies show that this discrimination has persisted despite the existence of 42 U.S.C. § 1983 and Title VII, long after the 1978 enactment of the Pregnancy Discrimination Act made discrimination on the basis of pregnancy an actionable form of gender discrimination under Title VII. Altogether then, the studies show that states' discriminatory leave policies are just the sort of difficult and intractable problem that justifies broad prophylactic measures in response.

Pet. App. 21a.

Second, in adopting section 2612(a)(1)(C), Congress was also prompted in part by equal protection problems associated with the fact that many employers (including Nevada and most other States) offered no entitlement to family medical leave.[25] The absence of a right to family leave, while not facially sex-based, raised extant and potential equal protection problems to which section 2612(a)(1)(C) responded.

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[25] At the time of the FMLA's passage, 32 states lacked any law applicable to state employees that conferred a right to family medical leave (as distinct from pregnancy disability or parental leave). Of the 18 states that had family medical leave policies, all but one (Illinois, enacted in 1983) were enacted after 1987 when the FMLA's immediate precursors were already under consideration in Congress. *See* ALASKA STAT. § 23.10.500-.550 (enacted 1992); CAL. GOV'T CODE § 12945.2 (enacted 1991); P7-4-12, 4 COLO. CODE REGS. § 801-2 (6-91) (enacted 1987); CONN. GEN. STAT. § 5-248a, 248b (enacted 1988); FLA. STAT. ANN. § 110.221 (enacted 1991); GA. CODE ANN. § 45-24 (enacted 1992); HAW. REV. STAT. §§ 79-32, 398-1 to -10 (enacted 1991); ILL. COMP. STAT. 415/8c (enacted 1983); ME. REV. STAT. ANN. tit. 26, §§ 843-849 (enacted 1988); N.J. STAT. ANN. § 34:11B-1 to -16 (enacted 1989); N.D. CENT. CODE § 54-52.4 (enacted 1989); OKLA. STAT. tit. 74, § 840.7C (enacted 1989); OR. REV. STAT. § 659.560-.570 (enacted 1992); R.I. GEN. LAWS § 28-48-1 to -10 (enacted 1990); VT. STAT. ANN. tit. 21, §§ 470-474 (enacted 1991); WASH. REV. CODE § 49.78.010-.901 (enacted 1989); WIS. STAT. § 103.10 (enacted 1987). Moreover, the few states that did begin offering family medical leave once the FMLA was under consideration had not only failed previously to provide family medical leave, but also provided no pregnancy disability, maternity or paternity leave rights (*see, e.g.*, Oklahoma, Maine, West Virginia), or provided only pregnancy disability leave for women, with no family leave for either sex (*see, e.g.*, California, Connecticut, Florida, Hawaii, New Jersey, Oregon, Rhode Island, Vermont, Washington).

When employees lacked a right to family medical leave, purely discretionary family leave decisions were often infected by the prevalent sex-based assumptions identified above regarding differential male and female family leave needs. Employers use their discretion to be more generous in granting leave to women than to men, based on a general perception that women bear greater family responsibilities and so have a more pressing need than do men to take time off from work in order to provide family care. Extending greater leave opportunities to women than to similarly situated men due to sex-based assumptions about differential needs—rather than actual, sex-neutral evaluation of needs in individual cases—violates men's equal protection rights.

No-leave state policies also imposed a disproportionate adverse impact on women which, in this context, violated equal protection. The court of appeals found ample support for section 2612(a)(1)(C)'s remedial character in the fact that it was "designed to undo the impact of [a] history of state-supported and mandated sex discrimination as it continues to affect public and private employment." Pet. App. 23a. Although disparate impact on women does not, taken alone, violate equal protection, *see Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), where, as here, the disparity is a continuing effect of past intentional discrimination, it is unconstitutional, *id.* at 272 (a neutral law with a disproportionate adverse impact on a protected class violates equal protection where "that impact can be traced to a discriminatory purpose"). Because the history of pervasive state-sponsored sex discrimination substantially contributed to the current discriminatory effect of a facially sex-neutral failure to grant family medical leave, remedying that discriminatory effect is well within Congress's power under § 5. *See Boerne*, 521 U.S. at 526 (citing with approval reasoning of Brennan, J., in *Oregon v. Mitchell*, 400 U.S. 112, 235 (1970), that facially neutral literacy requirements which the Court previously upheld

against equal protection challenge could be barred by Fourteenth Amendment legislation because the literacy requirements' discriminatory effects resulted from previous unconstitutional governmental discrimination in education).

The court of appeals relied on the FMLA's legislative history recounting "the harmful and extant effects of [state-supported] stereotypical gender roles on women's participation in the workforce," including the fact that working women were disproportionately likely to be caretakers for sick relatives, and were often forced to quit their jobs to care for their relatives. Pet. App. 33a-34a (quoting H.R. Rep. No. 103-8(I) at 24 (1993); S. Rep. No. 102-68 at 28 (1991)). The court also catalogued a history of explicit sex-based classifications in state law, including maximum-hour and minimum-wage laws and night work prohibitions for women but not men, various restrictions on the types of tasks or occupations in which women could participate, and sex-based restrictions on employment benefits for widowers that did not equally apply to widows. Pet. App. 24a-28a.[26] By the time Congress took up the subject of job-protected family medical leave,

> [s]tate support for stereotypical gender roles had allowed American employers—including the states—to develop and function without accommodating workers' home responsibilities during emergencies. Because women filled the caretaking role during times of crisis, men were expected to continue their work without interruption from domestic responsibilities. And, even as women entered the workplace in greater numbers, the continuing expectation that women would assume responsibility for domestic concerns put a burden on both working women and working men, hindering women's ability to compete equally in the marketplace while making it difficult to recast family responsibilities by sharing critical responsibilities at home.

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[26] Contrary to petitioners' suggestion, Pet. 21, these judicial decisions are relevant whether or not Congress explicitly cited them. *See Garrett*, 531 U.S. at 376 (Kennedy, J., concurring); *South Carolina v. Katzenbach*, 383 U.S. 301, 311-12 (1966) (reviewing prior Fifteenth Amendment litigation in this Court as relevant support for the Voting Rights Act provisions under that amendment's enforcement clause).

Pet. App. 31a-32a. The court noted that the FMLA's text and history "quite explicitly reflect this same understanding of the historical dynamic, and an intent to change it." *Id.* at 32a (citing 29 U.S.C. § 2601(a)(5); H.R. Rep. No. 103-8(I), at 16-17 (1993); S. Rep. No. 102-68, at 37 (1991)); *see also The Family and Medical Leave Act of 1987: Joint Hearings Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the Comm. on Education and Labor*, 100th Cong. (1987) (statement of Donna Lenhoff).

Congress in the FMLA addressed discrimination by States and private sector employers alike.[27] Such express congressional focus on public as well as private employers sharply distinguishes section 2612(a)(1)(C) from other laws this Court has held are not valid exercises of Congress's section 5 power. The Court in *Garrett* stressed that Congress expressly limited its employment-discrimination findings in the ADA to "the private sector." *Garrett*, 531 U.S. at 371-72. The Court concluded that "Congress' failure to mention the States in its legislative findings addressing discrimination in employment reflects that body's judgment that no pattern of unconstitutional state action has been documented." *Id.* at 372. The evidence of state discrimination in the legislative record could not suffice to overcome the clear implication of the statutory findings that the challenged ADA provision responded only to private-sector discrimination. By contrast, in enacting the FMLA Congress addressed patterns of leave discrimination common to both public and private sector employers.

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[27] Congress received compelling evidence that public-sector employees were faring no better than their private-sector counterparts. *See, e.g., The Parental and Medical Leave Act of 1986: Joint Hearing on H.R. 4300 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 99th Cong. 30 (1986) (statement of Meryl Frank, Yale Bush Center) ("public sector leaves don't vary very much from private sector leaves"); *id.* at 90 (statement of Barbara Easterling, Communications Workers of America) (unions representing both private- and public-sector employees reached the same conclusion regarding their "public and private sector members"); 139 Cong. Rec. H399 (daily ed. Feb. 3, 1993) (remarks of Rep. Bishop) (recounting receiving complaints from people "who were employed in State government and who were employed in the private sector").

As the court of appeals noted, it is of paramount importance here that the FMLA, unlike the statutes at issue in *Kimel*, *Garrett*, and *Florida Prepaid*, is aimed at remedying sex discrimination, which is subject to heightened constitutional scrutiny. *Cf. Kimel v. Florida Board of Regents*, 528 U.S. 62, 88 (2000) (emphasizing that age classifications, unlike those based on sex or race, are not subject to heightened judicial scrutiny, and explaining that "[s]trong [prophylactic legislative] measures appropriate to address one harm may be an unwarranted response to another, lesser one").[28] In applying heightened constitutional scrutiny to sex-based distinctions, this Court has itself taken judicial notice of the pervasiveness of sex discrimination in governmental decision making, and has also relied on Congress's competence in identifying patterns of invidious discrimination. *See Virginia*, 518 U.S. at 531 ("Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history."); *J.E.B.*, 511 U.S. at 136 ("our nation has had a long an unfortunate history of sex discrimination, a history which warrants the heightened scrutiny we afford all gender-based classifications today") (internal quotation and citation omitted); *Frontiero v. Richardson*, 411 U.S. 677, 685-86 (1973) (plurality) (taking note that "women still face pervasive, although at times more subtle, discrimination in our national institutions, in the job market and, perhaps most conspicuously, in the political arena," and recounting Congress's role in identifying and remedying sex discrimination). Just as this Court is empowered to observe the nature and breadth of the

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[28] Petitioners find it "baffling" (Pet. 23) that the court of appeals below did not cite *United States v. Morrison*, 529 U.S. 598 (2000), which considered whether legislation aimed at remedying sex discrimination was appropriate under section 5. The Court in *Morrison* did not, however, question the assertions in that case of pervasive gender-motivated bias in state justice systems, but held that the statute was not appropriate section 5 legislation because it was directed at private persons, not state actors. *See id.* at 619-26.

problem of sex discrimination in general terms as a justification for applying heightened judicial scrutiny to respond to it, so, too, is Congress warranted in enacting remedial and prophylactic legislation based on its accumulated understanding of the historic and continuing function of sex-role stereotypes in perpetuating unconstitutional sex discrimination in employment and leave decisions, without providing detailed documentation in the legislative history of a widespread pattern of state sex discrimination in family medical leave. In any event, a "lack of support in the legislative record is not determinative" so long as the targeted constitutional "wrong or evil" is identified to the Court. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 646 (1999). There is simply no question, in light of Congress's express findings as well as the legislative history, that Congress identified a problem of unconstitutional sex discrimination and enacted section 2612(a)(1)(C) to remedy and prevent that discrimination.

The remedy Congress chose was a sex-neutral requirement that an employer hold an employee's job open for the time (up to 12 weeks) during which the employee needs to be absent to care for a sick family member. That remedy is congruent and proportional to the equal protection problems Congress addressed. The remedy is sex-neutral, because, as is so often the case with equal protection problems, both men and women suffered distinct kinds of harm from the discrimination Congress identified. Men's leave needs were taken less seriously than women's under discretionary policies, but women nonetheless were especially burdened by the lack of a right to leave. Congress feared, however, that providing leave rights to women only would "have serious potential for encouraging employers to discriminate" against them. 29 U.S.C. § 2601(a)(6). Doing so also would not be "consistent with the Equal Protection Clause," because, where a sex-neutral remedy served as well or better, denying the same rights to

similarly situated men would be unconstitutional. *Id.* § 2601(b)(4). The FMLA's creation of a sex-neutral, unpaid, and voluntary family leave entitlement is an especially fitting response to sex discrimination, because it ensures that employees have the opportunity to depart from traditional sex roles without insisting that they do so.

Congress acted appropriately in adopting a nationally uniform statute. Contrary to petitioners' suggestions, Pet. 15-16, 22-23, section 5 legislation does not "require[]... geographic restrictions." *Boerne*, 521 U.S. at 533. Indeed, even though more that 30 States lacked literacy requirements at the time, the Voting Rights Act's prohibition of English literacy requirements upheld in *Katzenbach v. Morgan* applied nationwide. 384 U.S. 641, 643 n.1, 654 n.15 (1966). Unlike some of the forms of racial discrimination in voting addressed through geographically focused provisions of the Voting Rights Act, *see South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the sex discrimination that the FMLA targets is not a regional phenomenon. The evidence in the legislative history and this Court's own cases instead reflects sex-based attitudes and practices that pervade our national culture, and are not particularly tied to political geography.[29]

Petitioner's objection to Congress "us[ing] its enforcement power to create an entitlement" as opposed to a "prohibition" (Pet. 17) misses the mark, because Congress undeniably has Commerce Clause power to create the entitlement, and must rely on its section 5 power only to provide for damages against state employers. Moreover, section 2612(a)(1)(C)

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[29] Additionally, Congress's desire to work cooperatively with the States calls for a uniform remedy. The National Conference of State Legislatures endorsed the FMLA early in the legislative process. *See The Parental and Medical Leave Act of 1987: Hearings Before the Subcomm. on Children, Families, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources, Part 2*, 100th Cong. 305 (1987) (statement of Roberta Lynch, AFSCME, referring to NCSL endorsement). It would have been out of keeping with the spirit of federal-

does not mandate that employers grant a "fixed ... benefit" of 12 weeks of family medical leave, Pet. 22, but only requires that employers permit as much time off as is actually needed to care for a family member's serious health condition, up to an annual ceiling of 12 weeks. *See* 29 U.S.C. § 2613. The FMLA guarantees only that an employer will hold the employee's job and continue to pay benefits if an employee demonstrably needs, and is willing to take, *unpaid* leave. *Id.* § 2612(c).

The 12-week ceiling in the FMLA is not arbitrary and intrusive, Pet. 17-18, 22, but was carefully drawn with substantial input from public and private employers as unlikely to impose significant burdens on employers, while still providing a meaningful amount of job-protected leave to employees.[30] Congress noted evidence that granting such unpaid leave would result in cost savings from decreased turnover, hiring and training of replacements, and that the net cost to employers of providing job-protected unpaid leave could be as inexpensive as $5.30 to $6.70 per employee per year.[31] The congressionally mandated follow-up study on experience with the FMLA showed a median length of FMLA leave of 10 days, and that 80 per cent of leaves pursuant to the FMLA were for 40 days or fewer. The study reported that the vast majority of employers in fact experienced little or no cost from FMLA compliance. Commission on Leave,

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state cooperation in support of the FMLA to point fingers at any subset of states as particularly culpable.

[30] That kind of empirically based judgment in the fashioning of legislative remedies is particularly within congressional competence and is entitled to deference. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n. 12 (1985).

[31] *See* S. Rep. No. 103-3, at 16-18 (1993); *The Family and Medical Leave Act of 1991: Hearing on S. 5 Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm on Labor and Human Resources*, 102d Cong. 12, 13, 23, 35, 91 (1991); *see also* S. Rep. No. 103-3, at 14 (describing survey of a handful of States that did have family and medical leave laws, which revealed that "sizable majorities of covered employers reported that the State laws were neither costly nor burdensome to implement.").

United States Department of Labor, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 125-26 (1996); *see also Balancing the Needs of Families and Employers, Family and Medical Leave Surveys*, 6-13 (2000 Update).[32]

The FMLA's 12-week standard is easily understood and administered. Petitioners' attempt to draw an analogy between "the substantial costs" imposed on States by the Religious Freedom Restoration Act remedies invalidated in *Boerne* and section 2612(a)(1)(C) of the FMLA, Pet. 18, is badly exaggerated. That comparison only underscores how slight is the impact of the right to unpaid family medical leave. This Court observed in *Boerne* that RFRA's "sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." 521 U.S. at 532. RFRA applies to every state agency and all state laws and decisions. Its "stringent test" requires States to demonstrate a compelling governmental interest and that the challenged approach is the least restrictive means of furthering that interest, a test triggered by a threshold claim of a "substantial burden" on the exercise of religion—a claim that is often highly contextual and "difficult to contest." *Boerne*, 521 U.S. at 533-534. The FMLA, by contrast, sets a clear and easily administered standard for the maximum amount of job-protected unpaid leave covered employees may expect to take for family care in any given year. Given the validity of Title VII, which imposes both disparate-treatment and disparate-impact standards, as legislation enforcing the equal protection prohibition against sex discrimination in employment in general,

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[32] Several other features of the FMLA tailor it so as to minimize burdens on employers, including states. The Act exempts employees who have not worked for the employer for at least 12 months and a minimum of 1,250 hours, 29 U.S.C. § 2611(2)(A), as well as certain highly compensated employees, *id.* § 2614(b), and employees in certain high-level or sensitive positions, *id.* §§ 2611(3), 203(e)(2)(C). The Act requires employees, where feasible, to give employers advance notice of their leave needs and make efforts to minimize any disruption of

see generally Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the constitutionality of the narrowly fashioned and minimally burdensome FMLA remedy follows *a fortiori*.

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the employer's operations, *id.* § 2612(e), and, where requested, to provide information to substantiate the family member's serious health condition, *id.* § 2613.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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